1975

The State of Utah, by and through its Industrial Commission; The State of Utah, by and through its Road Commission; and Flowell Electrical Association INC. v. Cox Construction Company Inc. : Brief of Appellant

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

RANDY OLSEN, by and through his Guardian ad Litem, Gaylen R. Olsen,
Plaintiff and Appellant,

vs.

THE STATE OF UTAH, by and through its INDUSTRIAL COMMISSION; THE STATE OF UTAH, by and through its ROAD COMMISSION; and FLOWELL ELECTRICAL ASSOCIATION, INC., a corporation,
Defendants and Respondents.

Case No. 13867

THE STATE OF UTAH, by and through its INDUSTRIAL COMMISSION; THE STATE OF UTAH, by and through its ROAD COMMISSION,
Third-Party Plaintiffs,

vs.

COX CONSTRUCTION COMPANY, INC.,
Third-Party Defendant.

BRIEF OF APPELLANT

Appeal from Judgment of the District Court
in and for Salt Lake County, State of Utah
Honorable G. Hal Taylor, Judge
Honorable Maurice G. Harding, Judge

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STATEMENT OF THE KIND OF CASE

This is an action for damages resulting from personal injuries arising out of a construction accident when the boom of a crane came in contact with uninsulated power lines belonging to the defendant, Flowell Electrical Com-

pany, and the State of Utah is alleged to be liable on the basis of statutory as well as common law liability.

DISPOSITION IN THE LOWER COURT

Defrendant, State of Utah, moved for Summary Judgment on the basis that as a matter of law plaintiff's Complaint failed to state a cause of action against it. On the 8th day of October, 1974, the Honorable Maurice Harding granted the Motion and entered a Judgment in favor of said defendant and against the plaintiff, No Cause of Action. (R. 9.) Prior thereto, defendant, Flowell Electrical Association, Inc., filed a similar Motion, and on the 24th day of May, 1974, the Honorable G. Hal Taylor granted the Motion and entered a Judgment in favor of said defendant and against plaintiff, No Cause of Action. (R. 87, 88.) Both Judgments became final on October 8, 1974.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the aforesaid Judgments of No Cause of Action and a remand of the case for a hearing on its merits.

STATEMENT OF FACTS

The accident which is the subject of this cause of action occurred on September 6, 1972, near Meadow, Utah. On that date, plaintiff's employer was acting as the general contractor for the State of Utah for the construction of Interstate 15 and was in the process of constructing a required southbound lane of a north to south

overpass. Approximately 31 feet above and to the south end of the overpass were electrical wires owned, controlled and maintained by the defendant, Flowell Electrical Association, Inc. Plaintiff's employer had planned to pour the cement for the concrete deck of the overpass by use of a concrete pump. However, on that date the pump had failed, so a crane-boom bucket combination, which had been maintained for such possibility, was being utilized.

At the time of the accident and immediately prior thereto, plaintiff was engaged as a laborer for Cox Construction Company and was working alongside the crane releasing cement for the bucket attached to the end of that crane's 50 foot boom when the boom inadvertently came in contact with the live, overhead wires. Plaintiff was struck by a bolt of electrical current consisting of 14,400 volts which had passed from those wires through the boom and into his body. Resultant injuries included the amputation of both legs below the knee and severe burns and tissue damage to both hands and arms.

Plaintiff's Complaint against Flowell Electrical Association, Inc., was based upon Flowell's negligence in maintaining live, high voltage, uninsulated wires in a construction area where the probability existed that a crane or other construction equipment could come into such close proximity to those wires that damage and injury could result unless those wires were de-energized at least while such equipment was in close proximity to those wires. (R. 192.)

Taken in the light most favorable to plaintiff, the evidence shows that about a week prior to the accident Brent Cox, general foreman for Cox Construction Company, had contacted Ralph Robinson, the representative of the defendant, Flowell, and Mr. Cox and Mr. Robinson made a joint inspection of the construction area. While at that site, Robinson concluded that if the crane and 50 foot boom combination were to be used for pouring of cement for the southbound lane of the overpass, the overhead electrical wires would become involved and, therefore, further action had to be taken. (Cox Deposition pp. 99-102.) After the accident occurred, at an investigatory hearing held by the Industrial Commission, Mr. Cox and Mr. Robinson appeared and testified that the arrangements concerning the lines were as follows:

> "Vance said Brent did you contact the Power Company previous to this pour?
>
> Brent said yes.
>
> Vance said who did you contact?
>
> Brent said Ralph.
>
> Ralph said yes he did contact me.
>
> Vance said is it your policy to have someone of your approval in the area when they are working around power lines?
>
> Ralph said the arrangement made was that Brent would contact us, Flowell Electric, when they were ready to have someone there and we would kill the line.
>
> Vance said did he do this?

Ralph said no we were never notified.

Vance said we require workmen contact the utility co., gas co., or whatever the case may be. They must have a representative at the project site at the time if at all possible. If they can kill the line this is what we would like to have done.

Ralph said this was the arrangement we made we told Brent to let us know a day ahead so we could schedule a man to be there until they were through and to shut the power off." (R. 42.)

The evidence furaher showed that the reason Mr. Robinson was never notified of the impending use of the crane was because the offices in Fillmore were closed at the required time and Cox was unable to locate him or any other representative of the electrical company. (Cox Deposition pp. 24, 25, 32, 33, 91, 92.)

Plaintiff's Complaint against the State of Utah was two-fold. First, as to the State Industrial Commission and second, to the State Road Commission.

As to the Industrial Commission, the Complaint alleged that contrary to Section 35-1-16(1), the Commission had failed to supervise this construction site and enforce the laws intended for the protection of the life, health, safety and welfare of the plaintiff. Specifically, that defendant allowed the general contractor to adopt a construction procedure which subjected the plaintiff to an unreasonable risk of harm, failed to direct the plaintiff's employer to furnish plaintiff with proper equipment for the work he was performing, failed to supervise the

use of the crane to insure the safety of plaintiff and finally, failed to have the electrical wires of Flowell de-energized before permitting the crane to come in close proximity to those uninsulated, high voltage overhead wires. (R. 190.)

The evidence taken in the light most favorable to plaintiff showed that the Industrial Commission was familiar with the provisions of the Code and that it implemented the duties enumerated therein by promulgating detailed safety rules and regulations which were published and distributed to all contractors throughout the State including a rule which provided that no equipment should come within ten feet of any electrical wires when working around such wires. (Gronning Deposition pp. 5, 13.) In addition, the Commission maintained safety inspectors who were assigned to specific areas of the State with directions to make periodic inspections of construction sites to insure that the contractors were performing their work in a safe manner and in accordance with the safety procedures of the Commission, and armed with the delegated authority to order the stoppage of any procedure they found which may be in violation of safety rules and regulations. (Gronning Deposition pp. 7, 11, 12, 13.)

The Commission has deputized other individuals not on the payroll of the Industrial Commission, under certaintain circumstances, to represent the Commission in the enforcement of its safety rules and regulations. This procedure has been followed in situations where the State

Road Commission is involved in an extensive project like the one involved in this case. (Gronning Deposition p. 18.) In spite of this, the record reveals that the only time the safety inspector assigned to this area ever contacted the Cox Construction Company concerning this project was sometime during the month of January or February of 1972, approximately six months before the accident. Further, this inspector failed to acquaint himself with the project or to note that the plans for the highway required the Cox Construction Company to be working beneath those uninsulated, high voltage electrical wires, and neither the safety inspector assigned to this area nor any deputized representative of the Industrial Commission was present at the construction site at the time of the accident.

As to the State Road Commission, the Complaint alleged that it was the governmental agency which employed plaintiff's employer to perform the work engaged in at the time of the accident and that it was negligent in the manner in which it supervised the activities of plaintiff's employer. (R. 191.) Again, the evidence taken in the light most favorable to the plaintiff established that an employee of the Road Commission, Franklyn Drew Rasmussen, was at the construction site in the capacity of not only a cement inspector but also a designated safety inspector. This employee was aware of the fact the lines were not de-energized, saw the crane being used near these wires, and instructed that the crane be moved. (Rasmussen Deposition pp. 13, 19, 24, 25.) The contrac-

tor, after this order, did in fact move the crane. Thereafter, this same employee again noticed that this hazardous situation was reoccurring, so this time he personally went to the crane operator and told that operator that he was too close to the wires to be safe. However, he did not specify the distance the operator was to remain from the line, did not specify that the work should cease, and did not make any other suggestions other than merely indicating that the crane was getting too close to the wires. (Rasmussen Deposition p. 25.) Specifically, the inspector explained to the Industrial Commission after the accident:

> "I had become concerned about the crane being too close to the power line. I had them move it about 20 minutes before the accident happened. Then about one or two minutes before it happened, I asked them to move the crane again." (R. 129.)

Under the points of this brief, plaintiff will present in more detail the specific relationship between each defendant and the basis upon which plaintiff contends the trial court committed error in granting the Judgments of No Cause of Action.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT, FLOWELL ELECTRICAL

ASSOCIATION, INC. AND AGAINST PLAINTIFF, NO CAUSE OF ACTION.

The defendant, Flowell Electrical Association, Inc., had a duty to take proper safety precautions after being notified that construction was being conducted around their wires. The regulations of the Utah State Industrial Commission Section 61-2 provide as follows:

> "When it is necessary to work in close proximity of power lines, the utility company which operates the lines shall be notified concerning such work. If it is deemed advisable, such lines may be killed. If 10 feet of clearance cannot be maintained, then the lines shall be killed or other positive safety procedures followed to prevent contact."

The standard of care required by an electrical company to abide by this duty has been defined in *Brigham* v. *Moon Electric Association*, 29 Utah 2d 292, 470 P. 2d 393, as follows:

> "Therefore, a high degree of duty is upon one who transmits electricity in high tension wires to see that no harm befalls a person rightfully in proximity thereto when that person is himself guilty of no wrong doing. In other words, the highest degree of care must be used to prevent harm from coming to others."

The above statement is in conformity with the general accepted law. In 29 C. J. S., *Electricity*, Section 339, it is stated:

> "It may be stated as a general rule that one maintaining electric wires and appliances is required to exercise such care as a reasonably prudent man would exercise under the circumstances, or care commensurate with, or proportionate to the dangers. * * * Those engaged of the business of conducting electricity over high voltage wires are bound to exercise greater precaution in its use than if the property were of less dangerous character, and are, therefore, bound to anticipate more remote possibilties of danger."

In addition to the requirement of exercising a high degree of care, there is another principle of law which is applicable to this case. This principle is clearly defined in 69 A. L. R. 2d 104, wherein it is stated:

> "The principle basis for determining liability of a power company for injuries resulting from contact between its wires and a crane or other moveable machine is the foreseeability of a situation arising which might lead to such injuries. If a reasonable prudent person in the position of the defendant should have anticipated dangers to others from its installations, the defendant may be held liable.
>
> This is so, even though the exact situation that caused the injury may not have been reasonably foreseeable."

In this regard, the record demonstrates that Flowell Electrical Association, Inc. was aware that the overpass was going to be constructed in close proximity to their wires, and if the crane was utilized, the height of its

boom exceeded the height of its electrical wires by at least 15 feet. The electrical company was also well aware of the Industrial Commission's regulation that an agent be at the project site anytime work was being conducted around the wires so that with its special expertise, it would be in a position to abide by the Industrial safety regulations and kill the lines. In addition, the company knew that the boom would have to be extended and that workmen would be required to be near the crane to handle the cement bucket leading from the boom, and if that boom should inadvertently contact the uninsulated overhead wires, 14,400 volts of electricity would be discharged through the boom and into any person in close proximity to the crane. Finally, plaintiff submits that the electrical company should have appreciated that with a construction project of such magnitude, any unnecessary construction delay would result in a severe financial loss to the contractor; and, therefore, that a reasonable contractor would attempt to avoid such delay.

Knowing these facts, Flowell still failed to maintain an agent at the construction site while the equipment was operating in the area of those wires. Further, it failed to "kill" the wires or make arrangements of bypassing those wires until construction in that area had terminated. Instead, it selected an alternate course of action whereby it would kill those wires only after being notified by the contractor that the boom was being used in the immediate area of those wires. Finally, after selecting this alternate course, which plaintiff submits was

fraught with danger, Flowell compounded this danger by failing to maintain a manner which would insure that it could be contacted and informed when that boom was being moved into the immediate area of those wires.

Plaintiff submits that a reasonable prudent person would have realized this alternate course, and other action taken, created an unreasonable risk of harm to persons working in proximity to those wires. It is common knowledge that in this day of necessity for the construction of highways, contractors are under a duty to perform within a specific time and are not able to delay their work without severe financial repercussions. This is so, particularly in this area of the State where weather plays an important part in the determination of when construction work may be done, that contractors must take advantage of all available working hours.

The facts demonstrated that on the date of the accident, the contractor utilized every reasonable means available to contact the agent of Flowell in order to have the power in Flowell's lines killed while the crane and boom were being used in close proximity to its wires. The contractor had no way of knowing whether Flowell's agents had absented themselves from the office or their homes for merely an hour or a day or whether their absence would be substantially protracted. Due to this lack of knowledge, the contractor did not act unpredictably in deciding to proceed with the construction in spite of the possible dangers. Plaintiff respectfully submits that under those facts, reasonable minds could differ as to

whether or not the electrical company exercised the high degree of care required in two major respects.

First, in its failure to conform to the safety regulations promulgated by the Utah State Industrial Commission in assigning an agent of the electrical company to this specific construction area in order that said agent could be on the job when this boom was moved under the wires. Plaintiff submits such requirement is not an unreasonable request when the facts indicate the boom was utilized in this area for less than one full working day.

Second, in its failure, after selecting the alternate course, to have its offices open during reasonable working hours so that the contractor could make contact and inform it that the crane was working under the wires.

POINT II.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE STATE OF UTAH, BY AND THROUGH ITS INDUSTRIAL COMMISSION, AND AGAINST PLAINTIFF, NO CAUSE OF ACTION.

The defendant, Industrial Commission of Utah, had a statutory duty to the plaintiff in this matter arising under Section 35-1-16(1) Utah Code Annotated 1953, as amended, which provides in part as follows:

"It shall be the duty of the Commission and

> it shall have full power, jurisdiction and authority,:
>
> (1) to supervise every employment and place of employment and to administer and enforce all laws for the protection of the life, health, safety and welfare of employees."

The responsibility of the Commission under that statute to see that the contractor furnishes plaintiff with a safe place to work was reaffirmed in the recent case of *Peterson* v. *Fowler*, 27 Utah 2d 159, 493 P. 2d 997 (1972). There the plaintiffs were dependents of an employee of a general contractor engaged in the construction of the sports center of the University of Utah. That employee was killed when a scaffolding fell from the ceiling and the heirs brought the action against the architect and a number of other contractors. In affirming the Summary Judgment granted by the trial court as to the architect, this Court made reference to the cited section of the Code above and stated:

> "He owed no duty to the subcontractors or their employees in connection with the scaffolding. His responsibility was to his client, the owner of the building, and his duty in that regard was to see that the sports arena was properly erected so that it would be safe for the uses for which it would be put when finished. *It is the duty of the Industrial Commission and not of the architect to see the contractors furnish their employees with safe places to work.*" (Emphasis added.)

In spite of the clear language of the statute and the

reaffirmance by this Court that the Industrial Commission did in fact have a legal duty under that statute, the Industrial Commission still asserts that it had no duty to be at the construction site to supervise the area and insure that the site be reasonably safe for plaintiff's work. The Industrial Commission argues that the legislature placed such a heavy burden of supervision upon it, that it is impossible for its agents to perform their delegated duties, and for that reason, it cannot be held liable for any injury which may result from its failure to meet that burden.

It is not unusual for the legislature, however, to place such a general and broad duty of supervision upon a governmental agency created expressly for the purpose of protecting persons in this State who are without any means of protecting themselves. For example, the legislature has delegated such broad responsibility to the Utah State Road Commission under section 27-12-8 Utah Code Annotated 1953, as amended, which provides in part:

> "The commission shall have the following powers and duties in addition to such other powers and duties as may be provided by law:
>
> * * *
>
> (5) To adopt such regulations governing the use by the public of state highways as may be necessary to provide for public safety and against undue use of the state highways.
>
> (6) To provide for highway safety under the direction of a qualified highway safety engineer whose duty it shall be to conduct high-

way safety surveys and locate, designate and recommend the removal by the state road commission of highway hazards to safety."

This is not merely a product of recent legislatures either. For example, during the 1919 session the Legislature enacted a statute delegating to the county governmental agencies the broad and general responsibility of maintaining *all* roads within the county. That statute provided:

Laws of Utah, 1919, Chapter 55, Section 2823

"The County Road Commissioner, where appointed, under the direction and supervision of the Board of County Commissioners shall:

1. Take charge of the public roads within the county, and employ and direct such competent help as may be necessary to properly perform his duties."

The legal effect of the statute and its application to a specific case was considered by this Court in *Romney* v. *Lynch*, 58 Utah 479, 199 P. 974 (1921). In that case the defendant was a general contractor for the State Road Commission in the construction of a State highway between Salt Lake City and Ogden, Utah. Pursuant to the terms of his contract, the defendant was required to provide a detour over a dedicated Davis County road. Plaintiff, while traveling by automobile, followed the direction of the defendant by taking that detour and, thereafter, while attempting to pass another automobile, an accident occurred which plaintiff claimed was due to the defective and dangerous condition of that detour.

Plaintiff alleged that defendant, as the contractor, had selected the detour and was responsible for the accident because of the unsafe detour road. A demurrer to the Complaint was granted by the trial court, and this court affirmed, emphasizing:

> "Under the provisions of Comp. Laws Utah 1917, §§ 2800, 5848, subd. 15, the Davis County road, on which the accident of which plaintiff complains occurred, is deemed a public highway. As such it was under the direction and supervision of the county commissioners of Davis county and it was the duty of said commissioners to keep the road clear of obstructions and in good repair. Section 2823, as amended by Laws Utah 1919, c. 55.
>
> It is therefore difficult to conceive upon what theory the defendant might be held to respond in damages for failure to keep in good repair the public road or highway in question.
>
> * * *
>
> If any legal duty, express or implied, under the facts pleaded in plaintiff's complaint, rested upon the defendant to maintain the Davis county road reasonably safe for travel, then we have indeed entered upon a new field of personal liabilities for judicial investigation and determination.
>
> Let it be conceded, as was contention made by the plaintiff, that defendant by his acts in closing the Clearfield-Sunset Highway and directing travel to the Davis county road thereby adopted the latter as a detour, then as a matter of law we think defendant had a right to use it for that purpose without assuming the re-

> sponsibilities that rested upon the county commissioners of Davis county of properly maintaining it. If the public highways of this state are open and presumed to be reasonably safe for the legitimate use of all citizens alike, then what good reason can be assigned why a contractor may not properly and rightfully avail himself of their use as a detour for the traveling public while he is engaged in the performance of work, such as the defendant here was undertaking to do, without having visited upon him the results occasioned by the negligence of the officials whose plain statutory duty it was to properly maintain them?"

Although no decision has been rendered by this Court since the passage of the Utah Governmental Immunity Act in 1965 construing the similar language contained in section 27-12-8, supra, that basis of liability does not appear to have been removed by this Court.

A reasonable basis upon which the legislature could have imposed such a duty upon the Industrial Commission does, therefore, exist. If it were determined that the defendant performed its duty in a negligent manner, a reasonable basis exists upon which liability could be imposed. Plaintiff contends that under the facts of the case at bar, reasonable minds could determine that this duty was negligently performed.

As previously noted, the contract between the State and Cox Construction Company was executed during the month of November, 1972, and a safety inspector was assigned to the section of the highway to be constructed by Cox Construction Company. The evidence established

that this safety inspector, Mr. Vance Abbott, made only one contact with Cox Construction Company in February of 1973, when he discussed with the general foreman the commission safety rules and regulations. On the date of that meeting, however, the construction company had not even commenced work. That inspector failed to examine the plans and specifications so as to determine if there were any areas where hazardous and dangerous conditions might exist for the employees of Cox Construction Company. In addition, that inspector failed to determine if the pending construction of the highway necessitated employees of Cox Construction Company to be engaged in work in close proximity to uninsulated electrical wires with either a crane or other equipment. Finanlly, on the date of the accident, the safety inspector was not even aware of the location of the Cox Construction Company or that the company was building an overpass directly underneath high voltage uninsulated electrical wires. The sole excuse for the failure of this inspector to make inspections after the inspection of February, 1973, was the work load required of him.

Finally, to insure that sufficient inspectors were available to see that the contractor furnished its employees with a safe place to work, the Commission has, in similar situations, deputized other employees at the site to perform the duties of a duly appointed safety inspector. However, that procedure was not ever followed in this case.

Plaintiff contends that the above facts, considered in

light of this particular accident, clearly indicate that reasonable minds could determine that the Industrial Commission failed to properly discharge its duty.

Plaintiff respectfully contends, therefore, that the trial court erred in granting the defendant's Motion for Summary Judgment and entering a Judgment in favor of the defendant, State of Utah, and against the plaintiff, No Cause of Action.

POINT III.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE STATE OF UTAH, BY AND THROUGH ITS ROAD COMMISSION AND AGAINST PLAINTIFF, NO CAUSE OF ACTION.

As previously stated, the liability of the State Road Commission was alleged on the basis of the failure of its safety inspector to exercise reasonable care after becoming aware that plaintiff was being exposed to the dangerous and hazardous situation of working in close proximity to overhead electrical wires which were not de-energized. Mr. F. Drew Rasmussen, as the employee of the Utah State Road Commission, was assigned to the Cox Construction project in the dual capacity of a cement inspector and a safety inspector. He knew that when the crane-bucket combination was utilized for the pouring of cement, that the overhead wires of the defendant, Flowell Company, were not de-energized, and as the work

progressed, realized that no specific employee had been assigned to the duty of controlling the distance between the crane and the overhead wires.

The evidence demonstrated that at one time when the danger became acutely obvious, he ordered the foreman to have the crane moved. Sometime after the crane had been moved in accordance with his orders, this inspector again noticed that the crane operator was not maintaining a proper clearance, and this time, instead of going to the foreman, he went directly to the crane operator to register his complaint. This time, however, neither the crane operator nor the foreman followed his instructions or heeded his warnings, and the boom was allowed to come in contact with the wires releasing the electricity and subsequently injuring the plaintiff.

It is the position of the plaintiff that when Rasmussen, as an agent of the Road Commission and acting within the scope of his employment, undertook to control the movement of the crane, that he was under a duty to perform that undertaking in a reasonable, prudent manner; and if he failed to do so, that failure would constitute a basis for liability for resulting damages. This reasoning is confirmed by numerous authorities which have addressed themselves to the fact that any person who, for whatever reason, assumes to perform a duty, although that duty may not be specifically delegated to him, must exercise that duty with due care.

Restatement of Torts, Second, explains this concept Under Section 323, which provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking."

And, again, at Section 324 A:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

In *Indian Towing Co.* v. *United States*, 350 U. S. 61, 76 S. Ct. 122, 100 L. Ed. 48, the United States had undertaken to maintain a lighthouse, had not acted with due care in so doing, and plaintiff's ship was damaged as a result. In explaining the consequences of such an undertaking, the court explained:

> "[I]t is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner. * * * The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

There have also been a series of cases recently in which compensation insurance carriers who voluntarily undertook to perform safety inspections and negligently performed those inspections on the employer's premises have been found to be answerable for such negligence as third parties.

See *Ray* v. *Transamerica Ins. Co.*, 10 Mich. App. 55 158 N. W. 2d 786; *Nelson* v. *Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N. E. 2d 769, revg. 39 Ill. App. 2d 73, 187 N. E. 2d 425; *Bryant* v. *Old Republic Ins. Co.*, (C. A. 6 Ky.) 431 F. 2d 1385; and the similar cases cited in 93 A. L. R. 2d 598.

In such cases, the Courts have refused to impose liability on the basis of the statutory construction of their

specific Workmen's Compensation Acts. However, even in those cases, the Courts have emphasized that any "bona fide" third party who voluntarily undertook to perform safety inspections would be liable therefore if the inspection is negligently performed.

Thus, in this case a jury could well find that Rasmussen, as an employee of the State Road Commission, in properly discharging his duty, should have either stopped the contractor or continued his supervision of the operation of the crane. Had he done so, this case would never have been brought before this Court. Plaintiff, therefore, respectfully submits that it is clear that the trial court erred in dismissing the Complaint as against the State of Utah and entering a Judgment of No Cause of Action.

POINT IV.

THE TRIAL COURT ERRED IN HOLDING THAT THE NEGLIGENCE OF PLAINTIFF'S EMPLOYER WAS THE SOLE, PROXIMATE CAUSE OF THE ACCIDENT.

Defendants have contended throughout this trial that even if sufficient evidence were to be shown to support a finding of negligence on their part, that plaintiff would still not be entitled to any recovery because the action of the crane operator in coming in contact with the wires was the sole, proximate cause of the accident. Defendants have claimed that the earlier decision of this Court in *Toma* v. *Utah Power and Light Company*, 12 Utah 2d

278, 365 P. 2d 788 (1961), is controlling since that decision held that the action of the crane operator was, as a matter of law, the sole, proximate cause of the accident. Plaintiff contends that the decision rendered in the *Toma* case, supra, must be confined to the facts of that case and has no application in the case at bar. Further, a careful analysis of the facts and law involved indicates that the conduct of the crane operator in the case at bar was nothing more than a contributing cause, and, therefore, an issue of fact is presented regarding causation.

In the *Toma* case, supra, the record was clear that the electrical company, prior to the accident, had cooperated with the contractor in having the electrical current well under control before any construction work was performed in close proximity to the wires. Also in the *Toma* case the record indicated that all parties involved were fully aware of the construction area, the proximity of the wires to the construction work, the nature and type of equipment being used, and that the power company had left their telephone number to be contacted, if necessary. On the basis of these facts, the lower court, in the *Toma* case granted a Motion for a Directed Verdict. This Court, in affirming that ruling, held there was an issue of negligence but ruled that the subsequent negligence on the part of the crane operator was the sole, proximate cause. This Court held:

> "Proximate cause has been defined as the cause next in relation to cause and effect. That which in natural sequence, unbroken by any effi-

cient, intervening cause produces the injury, and without which the result would not have occurred. That which is nearest in the order of causation. The last negligent act contributory to an injury without which such injury would not have resulted. The dominant cause, the moving or producing cause, this cause may be an act or omission. Proximate cause may be distinguished from immediate cause. The immediate cause is generally referred to in the law as the nearest cause in point of time and space, while the act or omission may be the proximate cause of an injury without being the immediate cause. The proximate cause may be more remote in time or space but closer to the result and is the responsible cause. When the causes are independent of each other, the nearest is, of course, to be charged with the accident and resultant injury.

In the Hillyard v. Utah By-Products Co. case we held:

> "More than one separate act of negligence, even though they do not happen simultaneously, may be proximate causes of an injury. * * * When one does an act or omits to take a precaution and under the circumstances, as an ordinary prudent person, he ought reasonably to foresee that his act or omission will thereby expose interests of another to unreasonable risk of harm such person may be liable for resulting injuries caused by any reasonable foreseeable conduct whether it be innocent, negligent or even criminal. * * *
>
> "One cannot excuse himself from liability arising from his negligent acts merely

> because the later negligence of another concurs to cause an injury, if the later act was a legally foreseeable event.
>
> "Where one has negligently caused a dangerous situation and a later actor observes or circumstances are such that he cannot fail to observe, such condition, but later actor negligently failed to avoid it, as a matter of law, the later intervening act interrupts the natural sequence of events and cuts off the legal effect of the negligence of the initial actor but if conduct of later intervening actor is such that he negligently fails to observe a dangerous condition until it is too late to avoid it, question whether later intervening act supersedes negligence of initial actor is for jury."
>
> Strenuous efforts have been repeatedly made to have us reverse or at least modify the Hillyard case, particularly as it has to do with the determination of when proximate cause becomes a jury question. It has been vigorously argued that this case imposes a severe and unreasonable burden upon the plaintiff, and works a grave injustice upon an innocent injured person. The injured person is often stopped from holding responsible one joint tort feasor while prevailing against the other. Regardless of these many efforts we have consistently upheld our decision in the Hillyard case."

In short, *Toma* was not a new concept but merely a reaffirmance by this Court of their earlier *Hillyard* decision. However, under *Hillyard*, in order for the subsequent negligent conduct to be the sole, proximate cause

of the accident, such conduct must meet the test of being an *independent intervening* cause. The *Toma* decision made no specific reference to the fact that the action by that crane operator was an independent, intervening cause; and, in fact, that legal concept was never discussed in the majority decision. However, *Hillyard* clearly discussed this matter and established that in order for the conduct of the second actor to be an independent, intervening cause, his act must not have been foreseeable by the original negligent person. In applying this to the case at bar, plaintiff contends that it was reasonably foreseeable on the part of both the Flowell Power Company and the State of Utah that even if the lines were not de-energized, plaintiff's employer would still continue to perform the construction work under the wires. This differs from the facts of *Toma* where there was no basis for holding that even if the power company negligently refused to cut the power lines, that the contractor would continue its construction work near the wires. The evidence was very clear that the contractor in that case did not proceed with any construction work without having first requested that the lines be de-energized, and the power company left its telephone numbers for any emergencies and remained available.

In the case at bar, however, the representative of the power company, when he made his personal inspection of the property, observed that the contractor had performed a considerable amount of the construction work under the wires before the company was contacted.

Further, the instructions given by the Flowell representative to the contractor were to the effect that, "When you start using the crane, get in touch with us, and if necessary, we can make arrangements to kill the lines." Certainly a jury could find that under the circumstances in the case at bar, it *was* foreseeable that if Flowell was not contacted, that the work would still continue and a crane operator might inadvertently come in contact with the live wires and some damage could result.

This concept of foreseeability as to the action by someone operating a crane under overhead wires is generally considered the crux of any case where the crane comes in contact with the wires.

Thcere is an extensive annotation on this matter in 69 A. L R. 2d 93. At Section 20 of this annotation, there are a number of cases which discuss this matter, and the annotation states that the general rule is as follows:

> "It has frequently been contended that a power company, even though it may have been negligent in some respects in regard to installation or maintenance of its wires, is not liable for injuries resulting from a contact between movable machinery and a power wire, on the theory that the power company's negligence was merely a condition and not a cause, and that the intervening negligence of someone else, generally the operator of the machinery, in making the contact,, was the actual cause of the injury.

> The fact that there was intervening negligence of someone other than the power company which may have contributed to the accident will not in itself bar recovery aginst the power company if such an intervening act could have been reasonably foreseen.
>
> Furthermore, even where an accident has been caused by the intervening act of a third party, a power company may be held liable if it fails seasonably to correct the situation created by such intervening negligence, with the result that another accident occurs. See Reardon v. Florida West Coast Power Corp. (1929) 97 Fla. 314, 120 So. 842, supra, § 11.
>
> But nonliability on the basis of intervening cause has usually been upheld if the intervening negligence act is of such a nature as not to bereasonably foreseeable by the power company, and if it has no relationship to the company's negligence."

Plaintiff respectfully submits that the foregoing clearly indicates there is a genuine issue of fact as to whether the subsequent action of the crane operator was a concurring cause of the accident.

CONCLUSION

Plaintiff respectfully submits that as to each of the named defendants in this case, the record has established issues of fact which can only be resolved by a jury trial. Plaintiff contends that in view of the foregoing, that this Honorable Court should reverse the decisions grant-

ing defendants a Judgment of No Cause of Action and remand this case to the District Court for a hearing on the merits.

Respectfully submitted,

RAWLINGS, ROBERTS
& BLACK

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